SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO THE

SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

ON THE

AUSTRALIAN HUMAN RIGHTS COMMISSION LEGISLATION BILL 2003

1. INTRODUCTION

1.1 Wide-ranging amendments to the structure and functions of the Human Rights and Equal Opportunity Commission ("the Commission") are proposed by the Australian Human Rights Commission Legislation Bill 2003 (Cth) ("AHRC Bill").

1.2 The proposed amendments can be divided into four categories:

1.2.1 Amendments that impact on the independence, legal integrity and effectiveness of the Commission by fettering the power of the Commission to intervene in cases before the courts that involve issues relating to the jurisdiction of the Commission.

1.2.2 Amendments that impact on the structure of the Commission and the public's understanding and perception of the Commission and its members, by:

(a) abolishing the positions of Aboriginal and Torres Strait Islander Social Justice Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner, Race Discrimination Commissioner and Sex Discrimination Commissioner;

(b) restructuring the Commission so that it consists of a President and three Human Rights Commissioners;

(c) preventing the President from delegating powers in relation to complaints of human rights breaches or discrimination in employment to the Human Rights Commissioner (or any other member of the Commission); and

(d) legislatively requiring that the Commission use the by-line "Human Rights – everyone's responsibility".

1.2.3 Amendments that remove the power of the Commission to make recommendations for financial compensation where there is a finding of a breach of human rights or discrimination in employment.

1.2.4 An amendment to rename the Commission the "Australian Human Rights Commission".

1.3 While the Commission is generally supportive of the proposed change of name, the Commission opposes all of the other amendments as either being a threat to its independence or as not assisting or promoting its efficient and effective operation.

2. FETTERING OF COMMISSION'S INTERVENTION POWER

2.1 The nature of an intervener

2.1.1 Rights of intervention in Australia today may be conferred by statute, or courts may, in their discretion, grant leave to intervene.[1] Current legislative arrangements provide that the Commission may seek leave of the court to intervene in cases raising human rights or discrimination issues.[2]

2.1.2 Once given leave to intervene, an intervener becomes a party to the case and can tender evidence and make submissions and appeal the decision.[3] The intervener's role is to make submissions which will be useful to the court and different from those of the other parties,[4] and which the court should have before it to assist it to decide the case. For example, there may be issues that other parties are not willing or able to present, or intend to present only in a limited fashion.[5] The intervener can also make submissions on a matter of public interest that would otherwise not have been made.

2.1.3 The intervention function is especially important in the High Court due to its status as the ultimate national appellate court, especially in constitutional cases or where large or complex issues of legal principle and legal policy are at stake.[6] The High Court has noted that interveners from a "responsible body with large interests" may have perspectives which help the court to see a problem in a larger context that the parties may overlook or neglect.[7]

2.1.4 The High Court has commented that interveners generally perform the useful task of collecting publicly available legal materials relevant to the case and presenting them for the court's consideration.[8] This latter role was emphasised and welcomed by the Full Court of the Family Court in the case of *Kevin and Jennifer*,[9] where the Court referred extensively to the Commission's submissions concerning the human rights issues relevant to the case[10] and noted, that "we were most indebted to the

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[1] Interveners also have an established role in Canadian and British courts: see *Attorney General (Cth) v Breckler* (1999) 197 CLR 83 at 136 per Kirby J.
[2] Section 11(1) (o) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ("HREOCA"), s. 20(1)(e) of the *Racial Discrimination Act 1975* (Cth)("RDA"), s. 48(1)(gb) of the *Sex Discrimination Act 1984* (Cth) ("SDA") and s.67(1)(l) of the *Disability Discrimination Act 1975* (Cth) ("DDA").
[3] Ibid.
[4] *Reference Re Workers' Compensation Act 1983 (NFLD) (Application to Intervene)* [1989] 2 SCR 335 at 339 per Sopinka J.
[5] *Levy v Victoria* (1997) 189 CLR 579 at 603 per Brennan CJ.
[6] Ibid at 650 – 651 per Kirby J.
[7] *Attorney General (Cth) v Breckler* (1999) 197 CLR 83 at 136 per Kirby J.
[8] Ibid at 137 per Kirby J.
[9] *Attorney-General (Cth) v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission* [2003] FamCA 94.
[10] Ibid, see, for example, [315]-[318], [342]-[347].

Commission for its assistance, which proved very helpful to us in considering this matter."[11]

2.1.5 The intervener may also be subject to orders for costs. An intervener may be liable to pay costs at least as to the extra expense incurred by the parties as a result of the intervention. The basis for an order for costs will be limited to that which will do justice between all parties.[12]

2.2 The Commission's practice in interventions

2.2.1 The Commission determines which cases it will seek leave to intervene in by reference to guidelines that it has put in place (see **Annexure A**).

2.2.2 Since its establishment in 1986 the Commission has intervened in 35 cases. The significant cases that the Commission has intervened in include:

(a) Family law cases involving issues of consent to surgical treatment by children[13] and sterilisation of young women with disabilities;[14]

(b) Cases involving child abduction[15] and the relevance of the Convention on the Rights of the Child in relation to relocation of children;[16]

(c) The right of people with a transsexual history to marry;[17]

(d) General human rights issues including:

(i) International law and the extent to which administrative decision makers are obliged to take into account international human rights instruments in making decisions;[18]
(ii) Inconsistency between State and Federal legislation in relation to the criminalisation of homosexuality;[19]
(iii) Freedom of political speech;[20]

(e) The interpretation of the race power in section 51(xxvi) of the Commonwealth Constitution;[21]

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[11] Ibid at [342].
[12] *Levy v Victoria* (1997) 189 CLR 579 at 603 per Brennan CJ.
[13] *Re Michael: John Briton, Acting Public Advocate (Victoria) v GP & KP and HREOC* (1994) FLC 92-486.
[14] *Re a Teenager* (1988) 94 FLR 181; *Re Marion No.2* (1994) FLC 92-448; *P v P; re Lessli* (1995) FLC 92-615; *Re Katie* (1996) FLC 92-659; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.
[15] *ZP v PS* (1994) 68 ALJR 554.
[16] *In the matter of: B v B: Family Law Reform Act 1995* (1997) No.TV 1833 of 1996.
[17] *Attorney-General for the Commonwealth v Kevin & Jennifer & HREOC* [2003] FamCA 94 (21 February 2003).
[18] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
[19] *Croome & Toonen v State of Tasmania* (1997) 71 ALR 397.
[20] *Langer v Australian Electoral Commission* (1996) 186 CLR 302.

(f) Native title;[22]

(g) Refugee cases dealing with the following issues:

(i) Section 474 ("the privative clause") of the *Migration Act 1958* (Cth);[23]
(ii) Rights of asylum seekers aboard the MV Tampa;[24]
(iii) Guardianship of unaccompanied children;[25]
(iv) Continued detention pursuant to s 196 of the *Migration Act 1958* (Cth);[26]
(v) Continued detention after serving a criminal sentence and pending deportation;[27]
(vi) Access by people in detention to legal representatives;[28]
(vii) Applications for refugee status as a result of the one child policy of the People's Republic of China;[29]
(viii) Protection visas under the *Migration Act 1958* (Cth);[30]

(h) Coronial inquest into deaths of asylum seekers following the sinking of the Sumber Lestari ("Ashmore Reef Inquest");[31] and

(i) Cases involving sex and marital status discrimination issues including:

(i) Access by unmarried women to IVF treatment;[32] and

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[21] *Kartinyeri v Commonwealth* (1997) 152 ALR 540.
[22] *Western Australia & Ors v Ward & Ors* [2002] HCA 28 (8 August 2002); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).
[23] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1 (4 February 2003); *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228 (15 August 2002).
[24] *Victorian Council for Civil Liberties Incorporated & Vardalis v Minister for Immigration & Multicultural Affairs & Ors* [2001] FCA 1297 (11 September 2001); *Minister for Immigration & Multicultural Affairs & Ors v Vardalis & VGCCL* [2001] FCA 1329 (17 September 2001); *Vardalis v Minister for Immigration & Multicultural Affairs & Ors* – M93/2001 (27 November 2001) (Special leave application to High Court of Australia).
[25] *Odhiambo v Minister for Immigration & Multicultural Affairs; Martizi v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 194 (20 June 2002).
[26] *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002* [2002] FCAFC 390 (9 December 2002); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*, No. S202/2002, appeal heard by Full Court of Federal Court of Australia on 2 October 2002. Decision reserved.
[27] *Ming Dung Luu v Minister for Immigration and Multicultural Affairs* [2001] FCA 1136 17 August 2001); *Luu v Minister for Immigration Multicultural Affairs* [2002] FCAFC 369 (27 November 2002).
[28] *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245.
[29] *C, L J & Z v Minister for Immigration and Ethnic Affairs*, unreported, O'Loughlin J, 30 March 1995.
[30] *Long Guan Chun &Ors v Minister for Immigration, Local Government and Ethic Affairs& Ors* (1996) 65 FCR 164; (1996) 136 ALR 303..
[31] Record of Investigation into Deaths of Nurjan Husseini and Fatimeh Husseini, Coroners Court of WA, Ref No 29/02 (13 December 2002).
[32] *Re McBain: Ex parte Australian Catholic Bishops Conference* [2002] HCA 16 (18 April 2002).

(ii) Relationship between sex-based insults and sexual harassment.[33]

2.2.3 The Commission has never had an application for leave to intervene rejected by a court. An application to intervene by the Commission has only been opposed by a party on two occasions: the Ashmore Reef Inquest[34] where the Commonwealth opposed the Commission's intervention and an intervention before the Australian Industrial Relations Commission where the respondent employee opposed the Commission's intervention. [35]

2.2.4 Under the Commission's Intervention Guidelines, where the Commonwealth is a party to the case, the Attorney-General and his Department are informed of the Commission's intention to intervene at the same time as the court and other parties and are provided with copies of relevant court documents and submissions at the same time as the other parties. Where the Commonwealth is not a party, the Attorney-General and his Department are informed of the Commission's intention to intervene very shortly, if not immediately, after the court and parties have been notified and are provided with any other relevant court documents and submissions shortly after they have been provided to the parties.

2.2.5 The Commission times its notification to the Attorney-General so as to maintain the perception of the Commission as an independent agency and to demonstrate appropriateness and courtesy to the court and the principal parties to the case.

2.3 The proposed amendments to the intervention power

2.3.1 The AHRC Bill provides that the Commission would only be able to intervene in a case with the Attorney-General's approval.[36] It sets out the following matters that the Attorney-General could have regard to in deciding whether to approve the intervention:

(a) whether the Commonwealth, or a person on behalf of the Commonwealth, has already intervened in the proceedings;
(b) whether in the Attorney's opinion, the proceedings may affect, to a significant extent, the human rights of persons who are not parties to the proceedings;
(c) whether in the Attorney's opinion, the proceedings have significant implications for the administration of the relevant Act and other legislation implemented by the Commission;
(d) whether in the Attorney's opinion, there are special circumstances such that it would be in the public interest for the Commission to intervene.

2.3.2 These provisions of the AHRC Bill are identical to provisions of the Human Rights Legislative Amendment Bill (No.2) (1998) ("HRLAB 2"),

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[33] *GrainCorp Operations Ltd & Anor v Markham* (2003) EOC 93-250.
[34] Record of Investigation into Deaths of Nurjan Husseini and Fatimeh Husseini, Coroners Court of WA, Ref No 29/02 (13 December 2002).
[35] *GrainCorp Operations Ltd & Anor v Markham* (2003) EOC 93-250.
[36] Items 24, 38, 91, 118 and 136 of Schedule 1 of the AHRC Bill.

which lapsed in the 38th Parliament. The Senate Legal and Constitutional Legislation Committee conducted an inquiry at the end of 1998 and early 1999 into HRLAB 2 to which the Commission made a submission arguing against the fettering of its intervention power.[37]

2.3.3 The Committee's Report recommended that the need for the Attorney-General's approval of a Commission intervention be removed. The Commonwealth Government reintroduced HRLAB 2 in 1999 and moved amendments that removed the need for the Attorney-General's approval and provided that:

> Before the Commission seeks leave to intervene in proceedings... the Commission must give the Attorney-General written notice of the Commission's intention to do so together with a statement of why the Commission considers it appropriate to intervene. The notice must be given at a time when there is still a reasonable period before the intervention is to take place.

HRLAB 2 was never voted upon and lapsed again.

2.3.4 The provisions of the AHRC Bill that require the Attorney-General's approval before the Commission may seek leave to intervene are therefore a return to the earlier version of HRLAB 2.

2.3.5 The provisions of the AHRC Bill in relation to the Commission's intervention power differ from the provisions of HRLAB 2 in one respect. The AHRC Bill contains an additional provision that the Attorney-General's approval would *not* be required when the President of the Commission is or was immediately before becoming President, a judge of the High Court or of a court created by the Federal Parliament.[38] In these circumstances the Commission would be required to give the Attorney-General written notice of its intention to seek leave to intervene together with a statement of its reasons for doing so. The notice must be given at a time when there is still a reasonable period before the Commission seeks leave to intervene.

2.4 Rationale for amendments

2.4.1 The Attorney-General stated in his Second Reading Speech that the amendment is to "prevent duplication and the waste of resources and to ensure that court submissions accord with the interests of the community as a whole".[39]

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[37] See the Commission's submission at http://www.humanrights.gov.au/legal/submissions/hrla98.html

[38] Item 26 of Schedule 1 of the AHRC Bill.

[39] Second Reading Speech, *Hansard*, House of Representatives, 27 March 2003, 13434.

2.5 The Commission's position on the fettering of its intervention power

2.5.1 The proposed amendments to the Commission's intervention power raise the following concerns for the Commission:

(a) The requirement to obtain permission may constrain the ability of the Commission to raise important human rights and discrimination issues

2.5.2 The effect of the proposed requirement could be to deny the Commission the opportunity to argue human rights and discrimination issues before the courts. This is particularly likely to result in cases where the Commonwealth takes a different view of Australia's human rights commitments from that taken by the Commission.

2.5.3 The ability to intervene in cases to raise issues of human rights and discrimination is an important function for the Commission and contributes significantly to the promotion and protection of human rights and public education about their relevance and importance. The proposed amendment threatens to undermine the ability of the Commission to continue to provide a robust and effective voice in this context and may limit the ability of courts to take relevant human rights considerations into account when deciding matters before them.

2.5.4 Of course, it is to be expected that the submissions of any intervener will not necessarily be accepted by a court, or form the basis for its decision. Nevertheless, the Commission maintains that the interests of justice, and the community as a whole, are best served by the advancement of a full range of views, including legal argument based on human rights principles.

(b) The requirement to obtain permission compromises the independence of the Commission

2.5.5 The requirement to obtain permission from the Attorney-General would seriously compromise the Commission's independence. It is a fundamental principle that an independent national human rights institution must be unfettered in the performance of all its statutory functions, within the constraints of legality.

2.5.6 The Commission considers that the imposition of a requirement for permission would be contrary to the *Principles relating to the Status of National Institutions*[40] (commonly referred to as the "Paris Principles"). The Paris Principles set out international minimum standards for national human rights institutions. They provide that a national institution vested with competence to promote and protect human rights shall:

[40] UN Doc: A/RES/48/134 (1993): http://www.un.org/documents/ga/res/48/a48r134.htm

> Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner

2.5.7 If the Commission's intervention function is fettered in the manner suggested in the AHRC Bill, then it will be difficult for Australia to claim adherence to the Paris Principles. The Commission is often described as being a model national human rights institution and it is one upon which other countries have modelled their human rights institutions.

2.5.8 That a different regime is seen as necessary where the President is or was a federal judge supports the Commission's assessment that the amendment compromises its independence. The Explanatory Memorandum to the AHRC Bill provides that this different regime "ensures that there are no constitutional issues arising from the appointment of a federal judge as President".[41] In the High Court case of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[42] the majority of the Court held that the appointment of a Federal Court judge to prepare a report for a Commonwealth Minister was invalid. The report was required for the Minister to make a determination in relation to certain issues. The majority of Court held the procedure provided for resulted in the position of the Federal Court Judge not being an independent one but rather "a position equivalent to that of a ministerial adviser"[43] and that this compromised "public confidence in the integrity of the judiciary as institution or in the capacity of the individual judge to perform his or her judicial functions with integrity".[44]

2.5.9 If the different process that is proposed when a federal judge is President of the Commission seeks to avoid the invalidity that existed in *Wilson's case*, then it follows that where the President is not a federal judge and the approval of the Attorney-General is required for an intervention, it could be perceived that the Commission ceases to be able to exercise the intervention function with integrity. The relationship becomes one where the Commission is subject to the individual discretion of the Attorney-General in the performance of one of its important statutory functions.

2.5.10 Furthermore, the proposed existence of a different regime where a federal court judge is President effectively creates two "classes" of President: one that is considered to be able or trusted to act independently when participating in Commission decisions as to whether to intervene in cases and one that is considered to not have these qualities. This perception is insulting to persons appointed to the position of President who are not federal court judges.

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[41] See para 40 of Explanatory Memorandum of the AHRC Bill.
[42] (1996) 189 CLR 1.
[43] Ibid 18 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.
[44] Ibid 365 per Brennan CJ, Deane, Dawson and Toohey JJ. See also George Williams, *Human Rights under the Australian Constitution* (2002), 209-210.

2.5.11 In the Commission's view, it is inappropriate and would be unacceptable to the public that the performance of this function should be subject to political control. It is particularly inappropriate and unacceptable in cases where the Commission seeks to put to the court a different view from that presented by the Commonwealth.

(c) The requirement raises actual or perceived conflict of interest

2.5.12 In addition to compromising its independence, the amendments also raise real issues of an actual or perceived conflict of interest given that, at times, the Commonwealth would be a party to a case in which the Commission wishes to intervene. Of the 35 cases in which the Commission has intervened to date, the Commonwealth has been a party in 18[45] and made submissions contrary to those of the Commission in 16.[46]

2.5.13 It is inappropriate for the First Law Officer of the Commonwealth to have a "gatekeeper role", so as to be able to determine who may apply to intervene in cases in which the Commonwealth is a party.

2.5.14 In such cases, further, there is a risk that the pre-requisite of the Attorney-General's permission for an intervention application will create a perception in the minds of other parties and their representatives that the Commission is not an independent and objective intervener but rather is aligned with the Commonwealth. Such a perception would run contrary to the policy requiring interveners to be independent and non-aligned with the parties, able to add a valuable element to the case that

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[45] See the cases referred to in footnote 46 below and add *Rodney Croome & Nicholas Toonen v The State of Tasmania* (1997) 71 ALR 397; *Re McBain: Ex parte Australian Catholic Bishops Conference* [2002] HCA 16.

[46] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *C, LJ & Z v Minister for Immigration and Ethnic Affairs*, Unreported, O'Loughlin J, 30 March 1995 & *Long Guan Chun, Li Liu Ying & Long Guan Juan v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 136 ALR 303; *Wu Yu Fang & Ors v Minister for Immigration & Ethnic Affairs*, FedCt(NT) DG4/95 & *Wu Yu Fang v Minister for Immigration and Ethnic Affairs and Commonwealth of Australia* (1996) 64 FCR 245; *In the matter of: B v B: Family Law Reform Act 1995* (1997) No.TV 1833 of 1996; *Kartinyeri v The Commonwealth of Australia* (1997) 152 ALR 540; *Western Australia v Ward* (2002) 191 ALR 1; *Ming Dung Luu v Minister for Immigration and Multicultural Affairs* [2001] FCA 1136 & *Luu v Minister for Immigration Multicultural Affairs* [2002] FCAFC 369; *Victorian Council for Civil Liberties Incorporated & Vardalis v Minister for Immigration & Multicultural Affairs & Ors* [2001] FCA 1297 & *Minister for Immigration & Multicultural Affairs & Ors v Vardalis & VGCCL* [2001] FCA 1329 & *Vardalis v Minister for Immigration & Multicultural Affairs & Ors*, M93/2001 (27 November 2001) (Special leave application to High Court of Australia); *Attorney-General for the Commonwealth v Kevin and Jennifer* [2003] FamCA 94; *Peter Martizi and Simon Odhiambo v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 194; *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 194 ALR 538; *NAAV v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 228; *S134/ 2002 v Minister for Immigration and Multicultural Affairs* (2003) 195 ALR 1; *Minister for Immigration, Multicultural and Indigenous Affairs v VFAD* [2002] FCAFC 390; *Al Masri v Minister for Immigration, Multicultural and Indigenous Affairs*, [2003] FCAFC 70 (15 April 2003); Record of Investigation into Deaths of Nurjan Husseini and Fatimeh Husseini, Coroners Court of WA, Ref No 29/02 (13 December 2002).

the parties might not be able to provide. The perception of alignment of the Commission as intervener with the Commonwealth would be overwhelmingly damaging in cases to which the Commonwealth itself is a party.

(d) The amendments pre-empt the authority of the courts

2.5.15 By permitting the Attorney-General to determine when the Commission may seek leave to intervene in a case, the amendments pre-empt the authority of the court to consider and determine whether it would grant leave to an intervener by preventing the Commission from approaching the court directly. It is properly a matter for the court presiding over a case whether an intervener should be granted leave. The courts are experienced in making such an assessment and are able to do so in the context of the cases before it, with knowledge of the issues that are relevant to the cases and an appreciation of the issues that will be raised by all parties.

(e) Duplication and Cost

2.5.16 One of the rationales given by the Attorney-General for imposing the requirement that his approval be given prior to the Commission seeking leave to intervene in cases is to "prevent duplication and the waste of resources and to ensure that court submissions accord with the interests of the community as a whole".[47]

2.5.17 The Commission is already bound by s 10A(1)(b) of HREOCA to ensure that its functions are performed "efficiently and with the greatest possible benefit to the people of Australia". The concerns of the Attorney are therefore already a required part of the decision-making of the Commission in the exercise of its functions, including decisions to intervene in cases raising human rights issues.

2.5.18 The Commission also frequently seeks the advice of Senior Counsel on the appropriateness and benefit of its intervention in the particular proceedings before it makes an application to the court for leave to intervene.

2.5.19 Furthermore, on the issue of duplication and cost, these are matters that the court considers and rules upon when it exercises its discretion to grant leave to a party to intervene. It is clear from numerous statements by the courts that they will not grant leave to parties seeking merely to duplicate the submissions of parties already before it. If an intervener does lengthen the hearing of the case and cause the parties to incur further costs in the process then the court is at liberty to order the intervener to pay such additional costs.

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[47] Second Reading Speech, *Hansard*, House of Representatives, 27 March 2003, 13434.

2.5.20 On the issue of ensuring that submissions accord with "the interests of the community as a whole", the Commission notes that all human rights issues are fundamentally and ultimately matters of interest to the whole community. However, any intervention by the Commission must focus upon a particular issue of human rights raised by the particular facts of the case. The Commission's role as intervener is to assist the Court by placing before it relevant submissions on human rights and discrimination law pertinent to the case.

2.5.21 The Commission rejects any suggestion that the Commission's interventions are a wasteful use of public monies. The cost of the Commission's 18 interventions over the last three financial years has been a total of approximately $200,000 (approximately $11,000 each). This amount reflects 0.5% of the Commission's total budget during that period.

2.5.22 The Commission is able to conduct its interventions on such a modest budget by virtue of the fact that many of the Senior Counsel engaged by it provide their services on either a pro bono or reduced rate basis and are often prepared to appear for the Commission without the need for Junior Counsel.

2.5.23 The Commission also notes that if a court was to regard a particular intervention as being wasteful of the court's resources, they would deny any such application for leave to intervene. As observed above, the court has not rejected an application by the Commission to intervene.

3. COMMISSION STRUCTURE

3.1 Current structure

3.1.1 The legislation implemented by the Commission provides that the members of the Commission shall be:

- the President;
- the Aboriginal and Torres Strait Islander Social Justice Commissioner;
- the Disability Discrimination Commissioner;
- the Human Rights Commissioner;
- the Race Discrimination Commissioner; and
- the Sex Discrimination Commissioner.

3.1.2 There has only been one permanent Disability Discrimination Commissioner, Elizabeth Hastings, and since her term expired in December 1997, the Human Rights Commissioner has acted as the Disability Discrimination Commissioner (other than a short period of time where the Sex Discrimination Commissioner acted in the position). The term of the last Race Discrimination Commissioner, Zita Antonios, expired in September 1999 and since that time the Aboriginal and

Torres Strait Islander Social Justice Commissioner has acted in the position.

3.2 Proposed restructure

3.2.1 The AHRC Bill proposes to alter the structure of the Commission, so that it would consist of:

- a President; and
- three Human Rights Commissioners.[48]

3.2.2 There is to be no division of portfolio responsibility among the three Human Rights Commissioners. However, it appears to be envisaged[49] that the functions associated with the portfolios of the "former Commissioners" might be delegated to the new Human Rights Commissioners.

3.2.3 The transitional provisions provide that the continuity of the appointment of the current Human Rights Commissioner and President is not affected by the amendments under the Bill.[50] They further provide for the automatic appointment of the current Commissioners as Human Rights Commissioners (on their existing tenures and with their existing entitlements).[51]

3.3 Rationale for proposed restructure

3.3.1 The rationale proposed for the restructure is that it will:

> Take into account the possibility of new areas of Commission responsibility (such as age discrimination), the fact that human rights issues increasingly cross over the portfolio specific boundaries of the existing structure (such as women with disabilities) and the social and economic environment that faces all levels of government and business.[52]

3.4 Comparable provisions in HRLAB 2

3.4.1 Somewhat different amendments were proposed under HRLAB 2, which provided that the Commission would be reorganised so as to consist of a President and three Deputy Presidents, each of whom would also have responsibility for one of the following grouped subject areas:

- racial discrimination and social justice;
- sex discrimination and equal opportunity; and

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[48] Item 13 of Schedule 1 to the AHRC Bill (and numerous proposed consequential amendments).
[49] See, for example, paragraph 73 of the Explanatory Memorandum.
[50] See item 144 of Schedule 1 to the AHRC Bill.
[51] see item 146 of Schedule 1 to the AHRC Bill.
[52] Second Reading Speech of AHRC Bill, *Hansard*, 27 March 2003, 13434.

- human rights and disability discrimination.

3.4.2 Those portfolio areas were to be identified in the title of each office holder. The Commission's comments on the proposal may be found in its submission to this Committee of 10 July 1998.[53]

3.5 Commission's concerns with proposed restructure

3.5.1 The re-structuring which would be effected by the AHRC Bill is unnecessary to achieve the government's objectives, unworkable and confusing. The result of its impact will be to reduce the status of each member as an expert providing leadership to the nation in his or her areas of functional responsibility. The overall effect is to downgrade, by generalising, Australia's commitments to the promotion of human rights and the elimination of discrimination both domestically and internationally where the portfolios of the current Commissioners reflect key international human rights obligations.

3.5.2 The re-structuring effected by the AHRC Bill is problematic for the following reasons:

(a) Adverse impact on the performance of Commission functions

3.5.3 The present structure of the Commission strikes an appropriate balance between the generalised roles of the President and Human Rights Commissioner and the specialist positions of the Sex Discrimination Commissioner, the Disability Discrimination Commissioner, and the Aboriginal and Torres Strait Islander Social Justice Commissioner.

3.5.4 It is proposed that the title of each of the Human Rights Commissioners is not to make reference to any area of speciality or focus. However, the present specialist Commissioners have a long established reputation and standing in the community and generate a sense of representation and responsibility among members of the Australian community with interests in those specialist areas. These interests are not narrow. They extend across the Australian community to encompass women, persons of all racial and ethnic backgrounds and people with disabilities.

3.5.5 The wide jurisdiction of the Commission makes a degree of specialisation within the Commission, through the existence of the specialist Commissioners, all the more important. Furthermore, the proposed generalisation of the functions of the Commissioners will potentially hinder the coherent functioning of the Commission by blurring the functional lines of responsibility across the specialised Acts the Commission implements.

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[53] See the Commission's submission at http://www.humanrights.gov.au/legal/submissions/hrla98.html

3.5.6 Of particular concern is that the amendments do not require a Commissioner to be specifically responsible for Indigenous issues nor reflect the present requirement in HREOCA that the Aboriginal and Torres Strait Islander Social Justice Commissioner have significant experience in the community life of Aboriginal persons or Torres Strait Islanders.[54] The position of Aboriginal and Torres Strait Islander Social Justice Commissioner has to date been held by an Indigenous person.

(b) Public confusion and resentment

3.5.7 The proposed generalisation of specialist positions that have a long established reputation and standing in the community will not only generate confusion, but will risk creating a feeling of resentment in those sections of the community who feel that the specialist Commissioners are well-placed to address their concerns. As noted above, these concerns may effect broad sections (or, indeed, in the case of women, the majority) of the Australian community.

3.5.8 The current titles of Commissioners enable the public to quickly and easily identify the key elements of the Commission's jurisdiction. This also has an educative function.

3.5.9 Furthermore, the application of the title of a current member of the Commission to three new positions stands to cause additional confusion among members of the public. As there will also be a position of President of the Australian Human Rights Commission, positions titled "Human Rights Commissioner" will create confusion about the difference in the roles of the President and the Human Rights Commissioners and may undermine the President's role as head of the agency.

(c) Unnecessary to achieve stated aims

3.5.10 It appears that the rationale behind the restructure of the Commission and the creation of generalist Human Rights Commissioners is that it will encourage flexibility, enhance the ability to deal with issues arising under more than one Act implemented by the Commission and create a wide body of expertise among the Commissioners.[55]

3.5.11 The Commission's current structure does not prevent the Commission from dealing with topics that raise broad or intersecting human rights issues in a flexible and informed manner. For example, the Commission's public inquiry into Children in Immigration Detention has touched upon issues relating to children with disabilities and issues relating to girls and young women in detention. Similarly, the

[54] Section 46B(2) of HREOCA. Note that the Commission has previously argued that this needs to be strengthened so that one necessary criterion for the position of Social Justice Commissioner is that the Commissioner is an Indigenous person: see HREOC submission to Senate Legal and Constitutional Legislation Committee inquiry into HRLAB 2.
[55] See para. 3.3 above.

Commission's 2000 report into access to electronic commerce dealt with issues of age and disability while the Commission's report "Age Matters" in June 2000 focused on age discrimination.

3.5.12 The broad approach reflects the fact that it is the duty of the Commission under HREOCA to ensure that its functions are performed with regard to the indivisibility and universality of human rights and with particular attention to people and groups affected by multiple human rights violations or discrimination.[56]

3.5.13 Furthermore, the making of Commission decisions in relation to many of its functions (such as interventions, examination of enactments and education) already requires the present Commissioners to have a breadth of knowledge that extends beyond their respective portfolios.

4. OTHER RELEVANT PROVISIONS

4.1 Inquiry powers under ss11(1)(f) and 31(b) of HREOCA

4.1.1 Section 11(1)(f) of HREOCA empowers the Commission to inquire into acts or practices by or on behalf of the Commonwealth that may be inconsistent with or contrary to any human rights. Section 31(b) of HREOCA makes the same provision in relation to acts or practices by an employer that may constitute discrimination in relation to employment. The powers related to these functions include reporting on any findings of human rights breach or discrimination to the Attorney-General and including in the report a recommendation that a specified amount of compensation be paid to the person who has suffered loss or damage as a result of the act or practice.[57] The Commission's recommendation is not legally binding or enforceable.

4.1.2 The AHRC Bill removes the power of the Commission to recommend financial compensation in the above situations. The rationale offered for the first amendment is that recommendations for financial compensation "cannot be pursued in any way".[58] While that may technically be so, the reality is that in the reports issued by the Commission that have recommended financial compensation, respondents have paid the compensation in 27% of cases.[59] One possible explanation for compliance with the Commission's recommendation is that, if a respondent refuses to make such payments, the Commission may refer to that fact in its report to Parliament[60] and this has the potential to cause public embarrassment for the respondent. Further, to the extent that such recommendations are symbolic rather than enforceable, they may nevertheless be

[56] Section 10A(a)(i) and (c) of HREOCA.
[57] Sections 29(2)(c)(i) and 35(2)(c)(i) of HREOCA.
[58] See Explanatory Memorandum para 49.
[59] The Commonwealth was respondent in 60% of the matters where the Commission recommended financial compensation in its report to the Attorney-General and it was not paid by the respondent.
[60] See section 29(2)(e) of HREOCA.

morally persuasive.

4.1.3 It is the Commission's opinion that removing the ability to recommend financial compensation for human rights breaches denigrates the pain and suffering that might be experienced in these circumstances. It is accepted legal practice for monetary awards to be seen as an appropriate (if often inadequate) form of compensation for such loss and to deny it to persons who have been found to have suffered a human rights breach is demeaning and trivialises the loss that may be suffered.

4.1.4 In relation to complaints of discrimination in employment under HREOCA, it is unfair that a person who has suffered a loss of wages as well as pain and suffering as a result of discrimination cannot be the subject of a recommendation for compensation. This is particularly so given the real and accurate manner in which loss of wages can be calculated. It is inconsistent that a person could pursue an unfair dismissal action through the courts and receive an award for compensation but cannot be the subject of a recommendation for compensation from the body vested with the power to inquire into the alleged act or practice of discrimination.

4.1.5 The Commission also notes that the power to make non-enforceable recommendations for compensation is not exclusive to the Commission. Other bodies with powers of investigation, such as Ombudsmen, have similar powers.[61]

4.1.6 Finally, the fact that the recommendation for financial compensation is not enforceable has not deterred respondents from settling complaints under HREOCA - in particular complaints of discrimination in employment. A respondent will be less inclined to settle a complaint if the Commission does not have the power to recommend financial compensation. Moreover, the cases in which the Commission has made such recommendations provide a useful guidance as to the amounts which could be sought or offered in conciliation.

4.2 Delegation of President's powers

4.2.1 The AHRC Bill removes the President's ability to delegate her inquiry powers under section 11(1)(f) and 31(b) of HREOCA in relation to complaints of breaches of human rights or discrimination in employment to the Human Rights Commissioner.[62]

4.2.2 It has consistently been the Commission's position that the President should be empowered to delegate these powers to any member of the Commission. The President should be allowed to utilise fully the

[61] See s 15 *Ombudsman Act 1976* (Cth), s 26(d1) *Ombudsman Act 1974* (NSW), s 50 *Ombudsman Act 2001* Qld), s 23 *Ombudsman Act 1973* (Vic), s 28 *Ombudsman Act 1978* (Tas), s 18 *Ombudsman Act 1989* (ACT).
[62] Item 31 of the AHRC Bill repeals section 19(2B) of HREOCA.

expertise brought to the Commission by the Commissioners.

4.2.3 The Commission, therefore, opposes this amendment and recommends that an amendment be made that would permit the President to delegate her powers under section 11(1)(f) and 31(b) to any other member of the Commission.

4.3 Complaints Commissioners

4.3.1 The Attorney would have power to appoint persons as part-time "Complaints Commissioners".[63] Those persons must be "legally qualified" (defined to mean they are or have been a judge or are enrolled as a legal practitioner).

4.3.2 The Commission's President would then be able to delegate to those persons the power to conduct inquiries into complaints of human breaches and discrimination in employment under sections 11(1)(f) and 31(b) as well as inquire into complaints of unlawful sex, race or disability discrimination under section 46PD of HREOCA.[64]

4.3.3 The rationale for this amendment is that it provides an option for the managing of complaint handling workloads.[65] This is unnecessary as there is currently no issue with the President's complaint handling workload nor are there any undue delays in the processing of complaints. If any assistance is required with the President's workload then the President has under HREOCA[66] (and retains under the AHRC Bill) the power to delegate her powers not only to a member of staff of the Commission but also to a person outside the Commission. The President can therefore already delegate her inquiry powers to an external person (such as a retired judge or member of the legal profession) if their expertise is required or to reduce any workload issues. This current system is working well and there is no backlog in relation to the processing of complaints and all obligations under the Commission's Service Charter are being met.

4.3.4 The Commission is of the view that this amendment does not assist in any way the efficient operation of the Commission or the exercise of the President's inquiry powers. Its impact is to detract from the "collegiality" and cohesiveness of the members of the Commission[67] by introducing a further layer of appointees into the structure of the Commission. The amendment also challenges the ability of the President to manage the administrative affairs of the Commission[68] by appointing persons over whom the President will have no control in areas that are essential to effective and efficient complaint handling,

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[63] See item 53 of Schedule 1 to the AHRC Bill.
[64] Item 69 of the AHRC Bill.
[65] Second Reading Speech of AHRC Bill, *Hansard*, 27 March 2003, 13434.
[66] Section 19(2)(b) of HREOCA.
[67] Section 8(2) of HREOCA.
[68] Section 8A(3) of HREOCA.

such as the meeting of timeframes and deadlines and consistent decision making.

4.4 "Re-focussing"

4.4.1 Each of the pieces of legislation implemented by the Commission provides a set of functions to be carried out by the Commission.[69] These functions are to be re-ordered such that the educational/research functions appear first.[70] This is said to be designed to "make education and dissemination of information on human rights the central focus of the new Commission's functions".[71]

4.4.2 In addition, a number of new functions have been added, including the function of "disseminating information on the [relevant rights/or grounds of discrimination] and of the responsibility of persons and organisations in Australia to [respect those rights/avoid such discrimination]".[72]

4.4.3 The Commission does not oppose the "re-focussing" as such but rather is of the view that such re-focussing is unnecessary as the Commission already dedicates significant resources and priority to its educative role. In the 2001/2002 financial year the Commission distributed over 95,000 copies of its publications. 50,000 of these were as a result of direct requests from members of the public.

4.4.4 Examples of the Commission's initiatives in the area of human rights education include:[73]

(a) *Face the Facts*
The production and distribution of 100,000 copies to school and community groups providing factual information to counter prevailing misinformation about refugees, immigration and Indigenous issues. The online version of the publication has been updated and will be released in the May 2003 together with an education module for secondary school children and a community guide.

(b) *Pregnancy Guidelines*
The guidelines were developed to provide practical assistance to employers in making their workplaces more "pregnancy-friendly" and to fulfil their legal obligations, under the federal Sex Discrimination Act, to not discriminate against pregnant (or potentially pregnant) employees. The guidelines arose from the National Pregnancy and Work Inquiry and reflected the large

[69] See, for example, s. 11(1) of HREOCA.
[70] See, for example, item 20 of the AHRC Bill.
[71] Explanatory Memorandum of the AHRC Bill, para. 28.
[72] See, for example, item 20 (aab) of the AHRC Bill.
[73] A thorough analysis of the Commission's educational role is contained in the Commission's submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into Human Rights,Good Governance and Education. The submission is yet to be released by the Committee.

percentage of complaints about pregnancy discrimination under the Sex Discrimination Act.

(c) *Sexual Harassment: A Code of Practice*
The Code of Practice is for Employers in the Commonwealth Government, private sector, unions, non government voluntary bodies, clubs and educational institutions not under the control of State Governments. Thousands of copies of the Code were distributed to business all over Australia. The Code is being updated and will be released soon.

(d) *Report of Ten Years Achievement of the Disability Discrimination Act*
The report details the way thousands of individuals and organisations have used the DDA to create change, either by making complaints of discrimination or by using the law as a basis for negotiating broad social change or educating organisations on their responsibilities.

(e) *Human Rights Education for Teachers and Students*
This is an online education program providing human rights materials for teachers that was initiated following the Commission's very successful Youth Challenge Program. Under Youth Challenge, the Commission held one-day fora for high school students around Australia to discuss and debate anti-discrimination issues with their teachers and with anti-discrimination experts from the Commission and the relevant State or Territory body.

Education modules have been produced under the banner of Teaching Human Rights and Responsibilities. Materials and activities which deal with potential sex, race and disability discrimination issues are presented in a way that is of relevance to the students in their school and transition to work lives. All modules are curriculum linked. Information about the modules is dispatched to teachers via an Electronic list serve. Some 3500 teachers have subscribed to this list serve.

(f) *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families*
The distribution of the Community Guide and Video which accompanied the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families* to community groups, schools, governments and to the general public as well as the development of an online education program about the Inquiry, its findings and an evaluation of the responses to the recommendations of the Report. The module is for upper primary and secondary school teachers and is to be released at the end May 2003.

(g) *Internet*

The Commission has utilised the Internet as a cost-effective means of communicating to and educating a broad cross-section of the community – including its online education program for schools, complaints information and to provide information and education materials to groups such as legal practitioners, teachers, nongovernmental organisations and employers and employees. In the 2001/2002 financial year there were about 3.3 million "page views" (a more reliable indicator of use than "hits" of which there were 3 million per month) by people using the Commission's website, an increase of about 40% on the previous financial year.

The Commission's electronic mailing list service also provides for an effective and inexpensive means of disseminating information to groups in the community and government. There are currently more than 14,000 subscribers across 11 topic-based lists, including:

- Children and Youth;
- Complaints and Legal Information;
- Disability Rights Update;
- Human Rights Awards;
- Human Rights Education;
- Human Rights;
- Indigenous Issues;
- Media;
- Priority (providing all mailing list messages on all topics);
- Race Discrimination;
- Sex Discrimination and
- Rural Issues.

4.4.4 The Commission also notes with concern that other changes proposed in the AHRC Bill potentially undermine its educative potential. As noted above, the intervention function provides an important opportunity for the Commission to promote human rights and to educate the public, through the forum of the courts, about their relevance and importance. Furthermore, the existence of specialist Commissioners plays an important educative role by alerting the public to the nature and scope of the Commission's jurisdiction, and this would be lost by the proposed generalisation of those positions.

4.5 "Human rights –everyone's responsibility"

4.5.1 It is further proposed to give the Commission a by-line, being "human rights – everyone's responsibility". The Commission would be required to "raise public awareness of the importance of human rights" by using and encouraging the use of that expression. The Commission would be able (but would not be required) to incorporate that expression in its logo and on its stationery.

4.5.2 This by-line was suggested by the Commission in the context of the HRLAB 2 proposal to change the Commission's name to the Human Rights and **Responsibilities** Commission. The Commission was of the view that if there were any need, which it doubted, to refer to "responsibilities" then this should occur in an informal by-line rather than in its name. It was not envisaged, however, that the use of such a by-line should be legislatively required.

4.5.3 Now that a different title is being suggested for the Commission in the AHRC Bill, the Commission is of the view that there is no need to have a by-line and especially not to have one that it is legislatively required to use. The Commission has adopted different by-line-type messages according to contemporary circumstances, priority and need. For example, during 1998 our stationery carried the by-line "Fiftieth Anniversary Year: Universal Declaration of Human Rights: 1998". Our current posters and postcards carry the message "Australia: Discrimination Free Zone". A legislatively imposed by-line will at best inhibit the Commission's ability to adjust its messaging to meet changing circumstances and priorities.

4.6 Re-naming

4.6.1 It is proposed to rename the Commission the Australian Human Rights Commission. The transitional provisions specifically provide that the alteration to the name is not to alter the continuity of the Commission's existence.

4.6.2 While the Commission is satisfied with its current title, the Commission does not oppose the renaming of the Commission in this form.

Annexure A

Guidelines on applications for interventions in Court proceedings

The Commission may intervene in court proceedings in a criminal or civil jurisdiction subject to the following guidelines:

1. The Commission may intervene in any case in which its intervention is permitted, sought or required by the courts.
2. The proceedings should involve the rights of one or more persons who are within the jurisdiction of an Australian court, or in a foreign court with a connection to Australian jurisdiction.
3. The proceedings must involve "intervention issues". These are issues of:
   (a) human rights (as *defined in the Human Rights and Equal Opportunity Commission Act 1986 (Cth));*
   (b) discrimination in employment *(as defined in the Human Rights and Equal Opportunity Commission Act* and the *Industrial Relations Reform Act 1993 (Cth)),.*
   (c) racial discrimination *(as defined in the Racial Discrimination Act 1975 (Cth));*
   (d) discrimination on the ground of sex, marital status, pregnancy or family responsibilities or discrimination involving sexual harassment *(as defined in the Sex Discrimination Act 1984 (Cth));* or
   (e) discrimination on the ground of disability *(as defined in the Disability Discrimination Act 1992 (Cth)).*
4. The intervention issues should be significant and not peripheral to the proceedings.
5. The Commission should put the intervention issues before the court only if these issues are not proposed to be put before the court by the parties to the proceedings or not adequately or fully so argued.
6. Notice of intention to seek leave to intervene in the proceedings should be given to the parties prior to the hearing with an indication of the intervention issues intended to be argued. In the event that a party then decides to fully raise or adopt the proposed intervention issues, the Commission will only press its application to intervene if the party then decides not to argue those proposed intervention issues, or if the party particularly seeks the support of the Commission (in such cases submissions in written form may be sufficient).
7. Notice of the Commission's intention to seek leave to intervene (and reasons why the Commission considers it reasonable to do so) must be given to the Attorney-General's office and the Manager of the Human Rights Branch of the Attorney-General's Department as soon as practicable after the Commission has decided to apply to intervene in the proceedings.